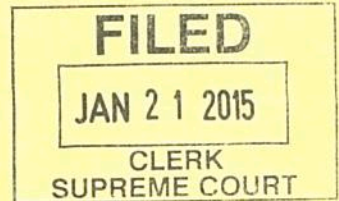


**Commonwealth of Kentucky  
Supreme Court  
2014-SC-000749-DG**



Garry W. Newkirk

Appellant

On Discretionary Review  
From the Kentucky Court of Appeals  
No. 2011-CA-001819

V.

Appeal from the Jefferson Circuit Court  
Hon. Olu A. Stevens, Judge  
Action Nos. 11-CR-0462 and 11-CR-2576

Commonwealth of Kentucky

Appellee

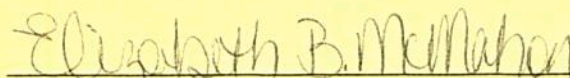
**Reply Brief for Appellant, Garry W. Newkirk**

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**Certificate of Service**

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and was delivered to Hon. Dorislee Gilbert, Special Assistant Attorney General, 514 West Liberty St., Louisville, KY 40202 (by email by agreement to dgilbert@louisvilleprosecutor.com), on January 20, 2016. I further certify that the record on appeal was not removed from the Office of the Clerk of the Supreme Court.

  
ELIZABETH B. McMAHON

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## **PURPOSE OF THIS BRIEF**

The purpose of this brief is to demonstrate the deficiencies in the arguments made by the appellee in its brief.

## **ISSUE TO WHICH THIS BRIEF IS ADDRESSED**

### **I. The circuit court properly excluded testimony about the contents of the destroyed surveillance video.**

The Commonwealth asserts that “contrary to Appellant’s representations Detective Lewis, in his summary, does not identify Appellant by name.” (Brief for Appellee, p. 2). Although the written summary prepared by Detective Lewis may not specifically state “Garry Newkirk,” it is clear that Detective Lewis is talking about Garry Newkirk and Garry’s brother, Daniel Newkirk. Detective Lewis compares what he supposedly viewed on the missing apartment surveillance video to what he viewed on the Circle K surveillance video:

I recall watching the video with the apartment complex manager, Carmen Montgomery, and the victim, Pearlette Isaac. From what I recall the suspect approached the front of the apartment and began to pry on the window with tools. After a short time he gained access to the window and climbed in. He was wearing blue jeans, blue in color, and a gray long sleeve shirt which appeared to be like a gray thermal type shirt. He entered the apartment thru the window and remained inside for a short time. After a few minutes he left by coming out the front door of the complex and out the front door of the stairwell that allowed access to the apartments inside. He leaves the apartment and walks around the sides (south west side) of the building then sight is lost of him. *The video of him and his brother at the gas station shows what he was wearing from the video I watched. You can plainly see the clothes are identical to what he had on in the gas station but you can’t see his face in the video.* You can tell he is a white male with specific clothing on, but the camera view was too far away to see facial features or scars or tattoos.



(TR 11CR0462, 47)(emphasis added). The burglary victim, Pearlette Issac, watched the video footage of the apartment break-in with detectives and the apartment complex manager before it was deleted. Ms. Issac believed that the man in the video was Garry Newkirk's brother, Daniel Newkirk. (TR 11CR0462, 13). Detectives interviewed Daniel Newkirk, but Daniel claimed that Garry had committed the offense. (TR 11CR0462, 13). Daniel also told police that he and Garry had been in a Circle K store prior to the time the burglary was committed. (TR 11CR0462, 13, 15; Discovery CD, p. 13).<sup>1</sup> The police obtained a copy of the Circle K surveillance video and reviewed it. According to Detective Kevin Lewis, the man on the apartment complex surveillance video was wearing "clothes... identical to what *he* had on in the gas station," meaning Detective Lewis was of the opinion that Garry Newkirk was wearing clothing identical to those worn by the man on the apartment surveillance video. (TR 11CR0462, 47).

The Commonwealth cites to the Maine case of State v. Robinson, 118 A.3d 242 (Me. 2015), as having similar findings to the Court of Appeals opinion in this case. However, the Commonwealth overlooks the distinguishing facts of that case. In State v. Robinson, the restaurant owner was permitted to testify that he had recognized the defendant, Robinson, in a surveillance video he had reviewed four or five days after the burglary of his restaurant. The owner knew Robinson because he had been a cook at the restaurant for almost two years. The video had been automatically recorded over approximately a month later

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<sup>1</sup> A CD containing pages 1-13 of discovery is located in the 11CR0462 file.

and was not in existence at the time of trial. State v. Robinson, 118 A.3d at 245-246. "The owner testified that, on the video of the night of the burglary, he saw a person come through the door, and he recognized the person as Robinson based on the intruder's height, size, hair color, and 'the way he was moving and interacting.'" State v. Robinson, 118 A.3d at 246. The Supreme Judicial Court of Maine determined that "the restaurant owner's testimony regarding his observations of the video was not precluded by the best evidence rule." State v. Robinson, 118 A.3d at 248. The Court then concluded that his identification of Robinson was admissible as lay opinion testimony based on the circumstances of that case:

[T]he owner's voir dire testimony established that he was familiar not only with Robinson's physical attributes, but also with his body movements, as the result of working with him for two years. Even if the video were available at trial, this information placed the owner in a better position than the jurors to make the identification....In addition, although there was evidence that the surveillance system was not intended for use at night and that the owner could not make out facial features while viewing the video, the owner explained that there was some light from various sources, and that he was able to view the intruder and conclude that it was Robinson. Thus, the observed evidence was not so "hopelessly obscure" that the owner could no better identify Robinson in the video than could a jury.

State v. Robinson, 118 A.3d at 250 (internal citations omitted).

In contrast, there is no evidence that Detective Lewis knew Garry Newkirk or was familiar with his body movements or physical attributes prior to viewing the apartment surveillance video. Rather, Detective Lewis at first investigated Daniel Newkirk as a suspect because the burglary victim, Pearlette Issac,

identified the man in the apartment surveillance video as Daniel Newkirk. (TR 11CR0462, 13). Detectives interviewed Daniel, but he claimed that Garry had committed the burglary and that he and Garry had been in a Circle K store prior to the time the burglary was committed. (TR 11CR0462, 13, 15; Discovery CD, p. 13). The police then obtained a copy of the Circle K surveillance video. It was Detective Lewis's opinion that the man on the apartment complex surveillance video was wearing "clothes... identical to what *he* [i.e., Garry] had on in the gas station...." (TR 11CR0462, 47). Therefore, unlike the storeowner in State v. Robinson, Detective Lewis was not in a better position than the jury to make an identification and had no personal knowledge on which to base his lay opinion testimony.

The Commonwealth cites to the unpublished case of Stovall v. Commonwealth, No. 2013-SC-000788-MR, 2014 WL 7239876 (Ky. Dec. 18, 2014), to support its claim that the destroyed apartment video surveillance is admissible under KRE 1004(1). (Brief for Appellee, pp. 13-15) (App. A1-A8).<sup>2</sup> In that case, a police officer was permitted to testify about a lost store surveillance video that was never produced to the defendant and was not played for the jury at trial.<sup>3</sup> Specifically, "Officer Stratton testified that he personally viewed the video which showed three males in hooded sweatshirts breaking into the store

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<sup>2</sup> Pursuant to CR 76.28(4)(c), a copy of this unpublished opinion is attached as Appendix A.

<sup>3</sup> This Court addressed the same issue in the case of Stovall's codefendant: Johnson v. Commonwealth, No. 2013-SC-0000787-MR, 2015 WL 3635292 (Ky. June 11, 2015). Johnson was discussed in the Appellant's Brief at pp. 23-25 and is attached as Appendix E to that brief.



and ransacking it.” Stovall v. Commonwealth, 2014 WL 7239876, at \*5. (App. A7). This Court held that the failure to produce the original video recording did not violate the best-evidence rule and that the prosecution sufficiently established that neither the Commonwealth nor the police acted in bad faith. Stovall v. Commonwealth, 2014WL7239876, at \*6. (App. A7). This Court also found that “Officer Stratton’s testimony was not hearsay” and that the Confrontation Clause was not implicated. Stovall v. Commonwealth, 2014 WL 7239876, at \*6. (App. A7).

However, in Stovall v. Commonwealth, as in the codefendant’s case, Johnson v. Commonwealth, No. 2013-SC-0000787-MR, 2015 WL 3635292 (Ky. June 11, 2015)<sup>4</sup>, this Court did not address KRE 602 and KRE 701 and the admissibility of *opinion testimony* concerning the contents of a missing video. Although the officer in Stovall and Johnson was allowed to describe what he had seen on the video, he was not permitted to tell the jury that the men in this missing video looked like the same men in another video. In the case at hand, the Commonwealth intended to introduce testimony through Detective Lewis that he believed the clothing (i.e., blue jeans and a gray long sleeved shirt) on the man in the apartment surveillance video matched the clothing that Garry Newkirk was wearing in the Circle K surveillance video and that the two men are the same person. (TR 11CR0462, 47). The Commonwealth specifically stated that it needed the testimony about the apartment surveillance video to establish the

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<sup>4</sup> Brief for Appellant, Appendix E.

link between the burglary and the surveillance video at a Circle K store that eventually led the police to Garry Newkirk. (VR No. 1, 9/6/11, 4:52:00-4:52:30).

In addition, this Court did not explain how Stovall v. Commonwealth and Johnson v. Commonwealth can be reconciled with this Court's opinion in Mills v. Commonwealth, 996 S.W.2d 473, 488 (Ky. 1999), which held that a police officer's "simultaneous commentary" when playing a crime scene video for the jury is only permitted where it is based on the officer's own personal observations and perceptions of the crime scene. Detective Lewis did not have personal knowledge concerning the actual events captured on this video and was not present when the video was made.

It is also important to note that in Stovall, this Court specifically pointed out that "the trial court permitted Appellant to have a missing evidence instruction, which allowed the jury to infer that the lost video would be favorable to his case if it were available" and emphasized that there was an "extensive amount of other evidence provided in the case" such that the Court "can say with fair assurance that the jury was not substantially swayed by Officer Stratton's testimony." Stovall v. Commonwealth, 2014 WL 7239876, at \*7, fn. 1. (App. A8).

The circuit court's ruling in this case comports with the Kentucky Rules of Evidence, is consistent with this Court's opinions, and properly protects Garry Newkirk's rights to a fair trial and effective cross-examination, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Sections 2



and 11 of the Kentucky Constitution. Because the circuit court did not abuse its discretion in excluding testimony about the deleted video surveillance footage, this Court should uphold the circuit court's ruling.

**CONCLUSION**

For the reasons stated in this brief and in his original brief, the appellant, Garry W. Newkirk, by counsel, respectfully requests that this Court affirm the order of the Jefferson Circuit Court.



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